Supreme Court, U. S.
FILED
MAR 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-1164

* * *

DR. N. JAY ROGERS, O. D., et al,
Appellants

V.

DR. E. RICHARD FRIEDMAN, O. D., et al,
Appellees

* * *

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

* * *

MOTION TO AFFIRM

* * *

JOHN L. HILL
Attorney General of Texas

DAVID KENDALL
First Assistant

STEVE BICKERSTAFF
Assistant Attorney General

DOROTHY PRENGLER
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys For Appellees
In Their Official Capacity

MARCH 1978

SUBJECT INDEX

	Page
STATEMENT	1
ARGUMENT AND AUTHORITIES	5
CERTIFICATE OF SERVICE	13

INDEX OF AUTHORITIES

Cases	Page
Ashmore v. Greater Greenville Sewer District, 44 S.E.2d 88 (S.C. 1947)	6
Baird v. Arizona, 401 U.S. 1 (1971)	7
Bates v. City of Little Rock, 361 U.S. 516 (1960)	7
Bradley v. Board of Zoning Adjustment of City of Boston, 150 N.E. 892 (Mass. 1926)	6
In re Campbell, 47 A. 860 (Pa. 1901)	6
Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974)	8
Cohen v. State, 275 N.Y.S. 2d 719 (N.Y. Sup. 1966)	6
Gibson v. Berryhill, 411 U.S. 564 (1972)	9,10
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)	8
Kachian v. Optometrists Examiners Board, 170 N.W. 2d 743 (Wis. 1969)	5
Lanza v. Wagner, 183 N.E. 2d 670 (N.Y. 1962), *cert. denied*, 371 U.S. 901	6

Cases **Page**

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 8

McCrory v. Wood, 171 So.2d 241 (Ala. 1965) 5,8

McGowan v. Maryland, 366 U.S. 420, 426 (1961) 6

Madden v. Kentucky, 309 U.S. 83 (1940) 6

Marks v. Franks, 298 P.2d 216 (Kan. 1956) 5

Matthews v. Lucas, 427 U.S. 495 (1976) 8

Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967) 7

NAACP v. Alabama, 357 U.S. 449 (1958) 7

New Orleans v. Dukes, 427 U.S. 297 (1976) 6,8,9

In re Opinion of the Justices, 42 So.2d 56 (Ala. 1942) 6

Rubins v. Ghezzi, 512 F.2d 431 (2nd Cir. 1975) 9

Seidenberg v. New Mexico Board of Medical Examiners, 452 P.2d 469 (N.M. 1969) 6

Texas State Board of Optometry v. Lee Vision Center, Inc., 515 S.W.2d 380 (Tex. Civ. App.-Eastland 1974, writ ref'd n.r.e.) 10

United States Dept. of Agriculture v. Murry, 412 U.S. 508 (1973) 8

Vlandis v. Kline, 412 U.S. 441 (1973) 8

Cases **Page**

Wall v. American Optometric Association, Inc., 479 F. Supp. 175 (N.D. Ga. 1973), *aff'd*, 419 U.S. 888 (1974) 9,10

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 6,8,9

Statute

Article 4552, Tex. Rev. Civ. Stat. Ann. §2.02 1,2,5,6,7,8,10,11

Miscellaneous

16A C.J.S. Constitutional Law §460 (1956)

63 Am. Jur. 2d Public Officers and Employees § 94 (1972)

Attorney General Opinion M-1029 (1971) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-1164

* * *

DR. N. JAY ROGERS, O. D., et al.,

Appellants

V.

DR. E. RICHARD FRIEDMAN, et al.,

Appellees

* * *

MOTION TO AFFIRM

* * *

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the limited portion of the final judgment and decree of the District Court which upholds the constitutionality of Section 2.02 of the Texas Optometry Act, article 4552, Revised Civil Statutes of Texas, be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

In a companion case to the case at bar, Appellee members of the Texas Optometry Board have filed a Jurisdictional Statement which sets out the history and background of this lawsuit. *See Friedman v. Rogers*, No. 77-1163. Since the procedural history of this case is already before the Court, Appellees will confine themselves to a direct response to Appellants' Statement of the Case in this Statement.

Appellants contend that the evidence produced at trial refutes all of the proferred rational bases for Section 2.02 of the Texas Optometry Act. The lower court, however, in noting that the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, found that Plaintiffs had not carried the heavy burden required of them to prevail on equal protection grounds in the face of Defendants' asserted rational bases. The Court also held that Plaintiffs' substantive and procedural due process arguments were without merit.

The state went beyond what is required of it and presented evidence to support its alleged rational bases for Section 2.02. For example, Appellees presented a variety of evidence in support of their contention that Texas Optometric Association (TOA) members are more likely to be economically independent than non-TOA members and thus less likely to be affected by any conflict of interest. Contract agreements for partnerships and for the purchase of Texas State Optical (TSO) offices entered into between Appellant Board member and other optometrists were admitted at trial and establish a close connection between the buyer and the seller as well as the seller's optical supply company. The buyer, a licensed optometrist, was required to follow the seller's (Rogers Bros.) rules, regulations, and policies for office management. The state could rationally expect that such contractual arrangements, with the resultant dependence of the buyer optometrist upon the seller optical company, could affect the impartiality of such a buyer as a potential Board member.

Appellees further introduced contracts between optical companies and practicing optometrists which guaranteed the optometrist a salary but gave both parties the power to terminate with only ten days notice.

Clearly, the optical company could utilize such a contractual right to bring pressure on the optometrist were that optometrist a Board member. Appellees even presented testimony by an optometrist who was a part owner in a large optical company at one time, but who has since entered into private practice with one associate, that if an optometrist employed by him when he was part owner of Lee Optical were a member of the Board and voted against the best interest of Lee Optical, that optometrist would either have been fired or forced to terminate because of unpleasant conditions. Since commercial optometrists are not admitted to TOA and thus TOA members tend to be financially independent, the state can reasonably expect that TOA members will not be as likely to be subject to the possibility of economic influence.

Appellants place great weight on the testimony of board member Dr. Hugh Sticksel, Jr., and his inability to distinguish between control over a Board member employed by a TOA member and one employed by Texas State Optical. The distinction lies in the interest of those who could exert such control over a Board member. It is clear that the chain optical companies would have much to gain from any influence upon a Board member. Dr. Rogers acknowledges that many provisions of the Texas Optometry Act are to his economic detriment. Clearly, the less vigorous the enforcement of these provisions, the less economic loss the chain optical companies suffer. Dr. Rogers based this lawsuit on the premise that he would secure more business for TSO if commercial restrictions were removed from the practice of optometry in Texas. A TOA member simply does not have such an inevitable, direct economic interest in these matters. The State has created a Board which will not be controlled by those with such conflicts of interest, but has not precluded their representation on the Board.

While Appellees submit that the State, without more, could rationally require a TOA majority due to TOA members' economic independence and lack of direct economic interest in the operation of the statutory provisions, the present composition is also a result of incidents taking place shortly before the adoption of the Act which might indicate to the Legislature that TOA members are more prone to enforce the Optometry Act than non-TOA members. In 1967, two optometrists employed by Lee Optical, Dr. Geller and Dr. Shropshire, were nominated to the Board. Since there were only five members of the Board, one of whom was Dr. Rogers, these nominations gave the "commercialists" control of the Board. Dr. Rogers was elected president of the Board at a meeting held without a quorum. Within months, Dr. Rogers had initiated a mail ballot which contained a vote concerning the repeal of the Professional Responsibility Rule, which was adopted in 1959 pursuant to an Attorney General's Opinion and a 542 to 31 vote in its favor in a poll of all Texas Optometrists. Drs. Rogers, Geller, and Shropshire voted to repeal this Rule and a dispute arose as to whether the rule had been legally repealed. The Board's attorneys, including the Honorable Thomas Gee, was of the opinion that the rule had not been legally repealed. In 1969, however, the Legislature codified the Rule, rejected the nominations of Drs. Geller and Shropshire to the Board, and required that a majority of the Board be members of TOA. Where regulations operate to the detriment of, and are opposed by, a group of persons, the State must be allowed to prevent those persons from controlling the enforcement of the regulations.

Appellants assert that since all optometrists agree on the proper examination of patients, the assertion that TOA members are more likely to emphasize the highest

quality of eye care is without basis. What appellants ignore is the impact of commercial methods upon the likelihood that a patient will receive the care that all acknowledge he should. The Legislature has decided that practices leading to a high volume optometric practice would tend to result in poor quality eyecare. The fact that Dr. Friedman would expect and hope that the same patient care would be given by a TOA member and a "commercialist" does not indicate that the same would hold true in the absence of vigorously enforced commercial restrictions. Appellants have failed in their burden to show the lack of this rational basis.

Appellants have totally failed in their burden to negate the asserted rational bases for Section 2.02 of the Texas Optometry Act. Furthermore, the evidence produced at trial established that the rational bases for the statute are supported by the facts.

ARGUMENT AND AUTHORITIES

The decision of the District Court is plainly correct. The requirements of section 2.02 of article 4552, the Texas Optometry Act, are clearly justified as a proper exercise of the State's power to determine the composition of its administrative branches as well as its authority to regulate economic matters. Fifteen states either require board members to be members of state optometric associations which are affiliated with the American Optometric Association or require the governor to select board members from a list of nominees prepared by such associations. Such statutes have been upheld when challenged, *McCrory v. Wood*, 171 So.2d 241 (Ala. 1965); *Marks v. Franks*, 298 P.2d 216 (Kan. 1956), since "the question of public policy involved in the composition of administrative agencies is for the legislature to debate and decide . . .." *Kachian v. Optometrists Examiners Board*, 170 N.W.2d 743, 748 (Wis. 1969).

Other cases upholding statutes which require board members to be members of a particular private organization or which delegate the power of appointment to such organizations are: *Seidenberg v. New Mexico Board of Medical Examiners*, 452 P.2d 469 (N.M. 1969); *Lanza v. Wagner*, 183 N.E. 2d 670 (N.Y. 1962), *cert. denied*, 371 U.S. 901; *Ashmore v. Greater Greenville Sewer District*, 44 S.E. 2d 88 (S.C. 1947); *In re Opinion of the Justices*, 42 So.2d 56 (Ala. 1942); *Bradley v. Board of Zoning Adjustment of City of Boston*, 150 N.E. 892 (Mass. 1926); *In re Campbell*, 47 A. 860 (Pa. 1901); *Cohen v. State*, 275 N.Y.S. 2d 719 (N.Y. Sup. 1966). *See also*, 63 Am. Jur. 2d *Public Officers and Employees* §94 (1972); 16A C.J.S. *Constitutional Law* §460 (1956).

Furthermore, as recognized by the lower court, section 2.02 constitutes an exercise of the state's power in the area of economic regulation. Consequently, "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . .," *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The lower court noted three justifications for the requirement of a TOA majority.

> (1) TOA members are more likely to be economically independent than non TOA-members;
>
> (2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and,

(3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

These rationales were not merely alleged; rather, the State went far beyond that which is required and offered uncontroverted evidence in support thereof. The attempts by non-TOA members, including Appellant Board member herein, to frustrate the proper enforcement of valid regulations were clearly documented. The State's proof illustrated the economic interest of many non-TOA members in avoiding regulations. The evidence showed more than the requisite rational basis; the necessity for section 2.02 was forcefully presented.

In somewhat of a hodgepodge of legal theories, Appellants assert that section 2.02 abridges freedom of association, equal protection, and procedural and substantive due process. Section 2.02 is also claimed to create a "chilling effect" on advertising.

This Court has found a violation of the right of association only when the record has shown an unjustifiable and "significant interference with the freedom of association." *Bates v. City of Little Rock*, 361 U.S. 516,523 (1960); *NAACP V. Alabama*, 357 U.S. 449, 462 (1958). Such interference has been found in these associational privacy cases, in an absolute exclusion of members of an association from professional licensing, and in prohibitions of association. *Baird v. Arizona*, 401 U.S. 1 (1971), *Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967). In the case at bar there is no significant intrusion upon this freedom. There is no evidence in the record which indicates that any person has been or will be deterred from exercising his freedom of association. This Court has never found a violation of a person's freedom of association in legislation which does

not penalize membership in any organization but which, at most, may provide some advantage to membership in a particular association. Section 2.02 does not restrict the right of any person to become a member of any association or penalize the exercise thereof. Accordingly, there is no intrusion, significant or otherwise, of any person's rights of association.

Appellants' equal protection claim was rejected by the lower court in reliance upon *New Orleans v. Dukes, supra*, in which this Court stated:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discrimination. See, *e.g., Lehnhausen v. Lake Shore Auto-Parts Co.*, 410 U.S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

Id. at 303. The State's proven rationales clearly satisfy this standard. *See also, Matthews v. Lucas*, 427 U.S. 495 (1976); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Williamson v. Lee Optical, supra; McCrory v. Wood, supra.*

The lower court dealt with Appellants' irrebuttable presumption argument as follows:

> Plaintiffs' reliance on three Supreme Court cases, *Vlandis v. Kline*, 412 U.S. 441 (1973);

> *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973), and *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974), as a basis for their allegation as to the unconstitutionality of their alleged irrebuttable presumption is ill founded. As contrasted with this case, all three of the cited cases involved fundamental rights, to which the irrebuttable presumption analysis has been limited. In the instant case, the Court must follow the reasoning of those non-fundamental rights cases involving sovereign state regulation of economic matters. See, *e.g. New Orleans v. Dukes, supra; Williamson v. Lee Optical of Oklahoma, Inc., supra.* A further consideration in the Court's rejection of Plaintiffs' position is that this article does not conclusively deny any person a Board seat.

The lower court was clearly correct; Appellants' view amounts to a restructuring of the equal protection standards which have long been observed by this Court, since any classification creates the type of irrebuttable presumption challenged here. *See Rubins v. Ghezzi*, 512 F.2d 431 (2nd Cir. 1975).

Appellants' procedural due process claim is also clearly without merit. As stated by the lower court, *Gibson v. Berryhill*, 411 U.S. 564 (1972) and *Wall v. American Optometric Association, Inc.*, 379 F. Supp. 175 (N.D. Ga. 1974), *aff'd*, 419 U.S. 888 (1974),

> are both readily distinguishable from the instant case for several reasons: (1) those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, therefore they speak directly only to the due process issues which

> surround disciplinary adjudications; (2) in those cases the board had rule-making power, which they had exercised, while in the instant case the Texas Board has no rule-making power, bu only power to enforce what the legislature has mandated; and (3) all members of those boards were members of the State Optometrical Association, while here one-third of the Board is composed of non-TOA members.

Furthermore, in *Gibson* and *Wall* the Court was concerned with an effort "to revoke the licenses of all optometrists . . . employed by business corporations such as Lee . . .." *Gibson v. Berryhill, supra* at 578; *Wall v. American Optometric Association, Inc., supra* at 188-189. Since the Texas Optometry Board has revoked only one license since the enactment of section 2.02 in 1969, and that revocation was not even appealed by the optometrist involved, it is clear that there is no such wholesale discrimination and no direct pecuniary benefit to be gained by any TOA board member from official action. *See Texas State Board of Optometry v. Lee Vision Center, Inc.*, 515 S.W.2d 380 (Tex. Civ. App.-Eastland, 1974, writ ref'd n.r.e.) By comparison, it may be noted that commercial optometrists would realize such a direct benefit from the failure to enforce statutory provisions which restrict commercial practices.

The only example offered by Appellants of the Board's "bias" is the Adoption of Interpretation No. 6 which concerned advertising. The Board's Interpreation was upheld as the correct construction of the law by both the Attorney General and the courts of Texas. Attorney General Opinion M-1029 (1971); *Texas State Board of Optometry v. Lee Vision Center, Inc., supra.* Far from showing bias on the part of TOA Board members, the 4-2 vote of the Optometry Board in this matter illustrates

the necessity of a TOA majority to insure enforcement of state law.

Appellants' speculative assertion that the Board will act against optometrists who advertise is closely connected to the "chilling effect" they claim is created by the TOA majority. There is no evidence in the record to support either of these speculations and the history of the Board's practice refutes both. The Board has commendably restricted itself to enforcement of statutory requirements and, as noted above, has revoked only one license since the enactment of article 4552. This exemplary record has been developed notwithstanding the fact that several commercial practices opposed by the TOA are permissible under article 4552. The Board members invariably testified that how an optometrist practices is not their concern as long as he obeys the law. The record of the Board illustrates the unassailable truth of this testimony. There is *no* reason to expect otherwise with respect to price advertising and Appellants have failed to establish sufficient facts to support their claim. Their speculations are conclusively controverted by the evidence.

Accordingly, the lower court correctly upheld section 2.02 and Appellants have failed to present any substantial questions which would merit plenary consideration by this Court. Appellees respectfully pray that the Court grant this motion to affirm on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

STEVE BICKERSTAFF
Assistant Attorney General

DOROTHY PRENGLER
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys For Appellees
In Their Official Capacity

DOROTHY PRENGLER
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Dorothy Prengler, a member of the Bar of the Supreme Court of the United States, have entered my appearance in the above referenced cause on behalf of the Appellee Board members in their official capacity. I do hereby certify that three copies of the foregoing Motion to Affirm have been served on all parties required to be served by placing same in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to all counsel of record: Robert Q. Keith, 1400 San Jacinto Bldg., Beaumont, Texas 77701, Larry Niemann, 1210 American Bank Tower, Austin, Texas 78701, Brian R. Davis, 408 First Federal Plaza, 200 E. 10th St., and John Tucker, Beaumont Savings Bldg., Beaumont, Texas 77701 on this the ___ day of March, 1978.

DOROTHY PRENGLER